

IN THE JUDICAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL

OF THE COMMONWEALTH OF THE BAHAMAS

B E T W E E N

**PARADISE ISLAND LIGHTHOUSE AND
BEACH CLUB COMPANY LIMITED**

Appellant

AND

**THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF THE BAHAMAS**

Respondent

CASE FOR THE APPELLANT

Structure of the Appellant's case:

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A. Introduction

A.1 The one issue

1. There is just one issue in this case: “*whether there was an agreement for a lease between Paradise and the Minister responsible for Crown Lands...*” [EB 124 §19].
2. That one issue would not now arise in England and Wales after 27 September 1989 when s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 came into force. The effect of that provision is that a contract for the sale or other disposition of land can only be made in writing and only by incorporating all the terms which the parties have agreed in one document or, where contracts are exchanged, in each with terms incorporated in a document either by being set out in it, or by reference to some other document etc. See Woodfall: Landlord and Tenant, §4.045. As noted in Woodfall at §4.045, now “...all the agreed terms of a contract must be set out in a single document or in each part of an exchanged contract. Thus, it will no longer be possible to construct a contract out of correspondence unless all the agreed terms are set out in a single letter.” [AB 18/EB 831]
3. There is no equivalent provision in the law of The Bahamas.
4. In this Appeal, the Appellant contends that the letter of 7 January 2020 from the Minister Responsible for Lands and Surveys [EB 399] evidenced a binding agreement between the Appellant and the Minister for the grant of a lease, i.e. there was a binding legal obligation to grant a lease to the Appellant in the terms of the lease sent under cover of letter dated 7 January 2020. The Appellant contends that the Judge at first instance [EB 14], and the Court of Appeal (by majority) [EB 115] were wrong and that the dissenting Judge in the Court of Appeal, who would have allowed the appeal and who would have ordered specific performance, [EB 148 §92] was correct.

A.2 The background facts

5. On Paradise Island in The Bahamas stands the oldest lighthouse in The Bahamas. It was in public ownership, derelict and abandoned and there were no plans, public or private, to restore it [EB 24 §16]. In 2012, Mr Toby Smith, a citizen of the Commonwealth of The Bahamas decided to see what steps he might take to preserve

the lighthouse. (As will be seen below, Mr Smith went on to incorporate and become the sole director and shareholder of the Appellant company). Mr Smith's Witness Statement at trial is at **[EB 100]**.

6. Having ascertained that the land in question was Crown Land, in April 2012 Mr Smith applied to the Minister for Land and Department of Lands and Surveys to lease 17 acres of Crown Land at Paradise Island for development for the restoration and up-keep of the Lighthouse: **[EB 119 §6]**.
7. Over the course some 7 years, during which time Mr Smith was dealing with more than 15 government departments, more than 100 government employees, sending thousands of emails etc. **[EB 102 §9]**, agreement was reached and The Bahamas Investment Authority ("BIA"), wrote to Mr Smith on 23 May 2018 **[EB 120 §8; EB 370]** (a better copy of this letter will be provided) noting that they were directed to advise Mr Smith that the National Economic Council ("NEC")¹ had agreed, on Mr Smith's application:
 - i. To recommend to the Minister responsible for Lands to approve the Plaintiff to acquire a 21 year Crown Land Lease for five (5) acres of Crown Land immediately adjacent to the property on which situate the Paradise Island Lighthouse and Keepers Quarters and also comprising land in the vicinity of the Colonial Beach and to include a portion of the seabed situate at the west Paradise Island, for the purposes of constructing and operating recreational and entertainment facilities offered to Bahamians and tourists; and
 - ii. Approving a public private partnership ("PPP") between Mr. Toby Smith and Antiquities, Monuments and Museum Corporation ("AMMC") for the renovation, maintenance and operation of the Paradise Island Lighthouse and Keeper's Quarters and construction and operation of recreational and entertainment facilities.

¹ The Bahamas Investment Authority acts as the administrative arm of the National Economic Council, a committee of Cabinet, Chaired by the Prime Minister:
<https://www.bahamas.gov.bs/bahamas-investment-authority-businesses>

(among other things).

8. In the light of the above, on 4 June 2018 Mr Smith caused the Appellant company to be incorporated to be the vehicle to receive the lease if granted: **[EB 120 §7]**.
9. On 2 October 2018, a Memorandum of Understanding was signed between the Appellant and the Antiquities, Monuments and Museum Corporation of The Bahamas with respect to the proposed development: **[EB 121 §9]**.
10. On 14 November 2018, the Minister agreed to negotiate a 21 year Crown lease agreement with the Appellant **[EB 214, §18, point 1]**.
11. On 15 August 2019 the Chief Counsel of the Attorney General's Office informed the Appellant that the "...*Crown Lease is being processed.*" **[EB 425]**
12. On 7 January 2020 the Acting Director of the Department of Lands & Survey wrote to the Appellant enclosing a lease for execution, see **[EB 399; EB 131 §53; EB 306]**.

The letter stated:

Captain Toby C.S. Smith
Paradise Island Lighthouse and
Beach Club Company Limited
P.O. Box EE-15718
Nassau, Bahamas

Dear Sir,

**APPROVAL FOR CROWN LEASE - FIVE (2+3) ACRES AT THE WEST
END OF PARADISE ISLAND - PARADISE ISLAND LIGHTHOUSE AND
BEACH CLUB COMPANY LIMITED**

Reference is made to the above subject.

Enclosed are the Lease and Counterpart for Lessee signing, dating, sealing
witnessing and notarizing.

The date at the top of page 1 should be left blank and it will be inserted at the time
of Lessor signature.

Please also note that the Lease Diagrams require signature.

After the above, please return both documents to the Department. Following Lessor
execution, one document will be sent to you for safekeeping.

Yours faithfully,

R.S. Hardy,
ACTING DIRECTOR”.

13. The Appellant executed the lease and returned it to the Department of Lands and Surveys on 9 January 2020: **[EB 132 §55; EB 400]**. The lease is at **[EB 306]**.
14. A month passed and the Appellant did not receive the lease from the Department of Lands and Surveys: **[EB 132 §56]**. The government had found a better deal **[EB 141 §76]**, i.e. a deal with Royal Caribbean Cruise Lines for their development **[EB 25 §20]**.
15. On 12 February 2020, the Appellant wrote to the Prime Minister, who was the Minister responsible for Crown Lands, asking for a “Comfort Letter” **[EB 121 §11; EB 405]**:

“...I am writing to you today to request a Comfort Letter. You mentioned today that my "land matter will be dealt with at the same time that you deal with Royal Caribbean Cruise Line's land matter on the 2nd March, 2020".

As you are aware, my application is almost eight years in the making. I have patiently waited for a favorable outcome so I am rather surprised that my lease is now somehow commingled with a foreign party's expression of interest that is only recent. Further, I understand directly from Royal Caribbean Cruise Line's legal counsel that they have applied for the whole area of Crown Land situated on the Western portion of Paradise Island, which wishes to encompass the land that I have applied for and contained within the Crown Land Lease Agreement. This has me deeply concerned...”

16. Following that letter, to which there was no written reply, Mr Smith met with the Attorney General on 27 February 2020, at which time it was contended by the Attorney General that there was no agreement between the Appellant and the Minister: **[EB 132 §58]**.
17. On 19 March 2020 the Appellant tendered to the Minister a cheque for \$29,254.40 which was the rent which the Appellant was required to pay under the Lease Agreement: **[EB 132 §59]**.

18. The Appellant commenced the claim on 18 May 2020 [EB 9]. In the High Court, the Honourable Chief Justice Sir Ian R. Winder dismissed the claim by a Judgment dated 16 February 2023: [EB 14].
19. By majority, the Court of Appeal dismissed the Appellant's appeal by a judgment dated 14 March 2024 [EB 115].
20. On 11 July 2025 the Court of Appeal granted leave to appeal on the usual condition of the provision of security: [EB 156].
21. The question in this case is whether the letter of 7 January 2020 [EB 399] evidenced a binding agreement between the Appellant and the Minister for the grant of a lease, i.e. was the Respondent under a binding legal obligation to grant a lease to the Appellant in the terms of the lease sent under cover of letter dated 7 January 2020.

B. The Supreme Court

22. By a Writ of Summons dated 18 May 2020 the Appellant commenced his claim seeking, among other things, a declaration that there was a concluded agreement for lease between the Appellant and the Minister: [EB 10 §2].
23. The matter was heard over three days, 30 March 2022, 7 and 9 May 2022, by Hon. Chief Justice Sir Ian R. Winder, whose Judgment, dated 16 February 2023, is at [EB 14].
24. There were two witnesses: Mr Toby Smith for the Appellant and Ms Candia Ferguson on behalf of the Attorney General [EB 23 §14].
25. The Chief Justice identified the central issue as follows [EB 24 §15]:

“15. The central issue to be determined in this action is whether there was an agreement for a lease between Paradise and the Minister responsible for Crown Lands and therefore an enforceable lease. This calls for a determination as to whether the lease delivered to Paradise, absent the signature and/or execution of the Minister constitutes a valid and/or enforceable lease agreement once signed by Paradise.”
26. Having recited the evidence that he had heard from the witnesses [EB 23 – 25] and set out the rival cases [EB 26 – 28], the Chief Justice went on to hold that there was no valid agreement, as the “Agreement” (as he had defined it) was subject to execution;

and / or that “there was no part performance”; and that “there had to be meeting of the minds for there to be an agreement” [EB 28 §30]. The Chief Justice distinguished *Walsh v Lonsdale* (1882) 21 Ch D 9 [EB 31 §34 ff] on the facts.

C. The case in the Court of Appeal

27. By majority in the Court of Appeal [EB 115], the central question was, again answered “no”.
28. The Appellant’s case is that, on a proper understanding of the law, the correct answer to the question was “yes” – as per the dissenting Judgment of Honourable Sir Michael Barnett, President, in the Court of Appeal, who would have ordered specific performance [EB 115; EB 148 §92] – and that an agreement for lease is as good as a lease, see *Walsh v Lonsdale* (1882) 21 Ch D 9 [AB 15/EB 794] [EB 124 §19; EB 138 §64]. This was common ground.

D. IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The Grounds of Appeal

29. The Grounds of Appeal of Appeal are at [EB 269] and are each addressed in turn below.
30. The Honourable Mr. Justice Smith, JA, gave the leading judgment: [EB 119]; the Honourable Mr. Justice Bernard Turner, JA, agreed without giving any reasons of his own: [EB 130 §46]; the Honourable Sir Michael Barnett, President, gave a dissenting judgment: [EB 130 §47 ff]. The Appellant contends that the appeal should have been allowed, for the reasons given in the dissenting judgment of the President.

Ground 1:

The central issue before the Court of Appeal was whether there was an agreement for lease: Judgment of the Court of Appeal, [EB 124 §19 and EB140 §67]. The correct approach in law was to consider, as Sir Michael Barnett had done at [EB 140 §70 – 148 §92], whether the letter of 7 January 2020, which enclosed the lease, evidenced a binding agreement for lease.

The learned Justices of Appeal (by majority) were wrong in law to consider that the central issue depended on “whether the lease delivered to and signed by the Paradise but not signed by the relevant Minister, could be considered as a valid agreement for a

lease” [EB 124 §20]. They asked themselves the wrong question. The real question was whether the essential terms of an agreement for lease were present as set out in Halsbury’s Laws [EB 140 §71] and Woodfall, Landlord and Tenant [EB 140 §70]. Had the learned Justices of Appeal (by majority) not so misdirected themselves, they would have held, as Sir Michael Barnett did, that all the essential terms of an agreement for lease were present; there was nothing further to be negotiated or agreed and that all that remained was for the Respondent to sign and seal the lease as per the agreement for lease: [EB 141 §76].

31. The learned Justices of Appeal (by majority) went wrong in focussing on the lease which was enclosed under cover of the letter of 7 January 2020 [EB 131 §53, 399] [EB 306], and concluding, from the fact that it was not signed by the Minister, that there was no agreement.
32. For there to be an agreement, the lease did not need to be signed. The fact that the lease was “*not signed by the relevant Minister*” was irrelevant; it completely misses the point. The correct question is to ask whether there is an agreement – not whether the parties have signed the lease that they have agreed will be granted. As at the date when the letter was sent (at the latest) there was an agreement for lease. The question of whether “*whether there was an agreement for a lease between Paradise and the Minister responsible for Crown Lands*”, which the learned Justices of Appeal (by majority) had correctly asked themselves [EB 124 §19], did not depend upon the lease being signed.
33. The learned Justices of Appeal (by majority) confused the concepts of an *agreement* for lease, with a *lease*. The learned Justices of Appeal (by majority) ought to have held, as per Sir Michael Barnett in [EB 141 §76], that “There was nothing further to be negotiated and agreed... All that was left was for the Respondent to sign and seal the lease.”

Ground 2

34. *The learned Justices of Appeal (by majority) further misdirected themselves when they purported to apply the decision of the Supreme Court: RTS Flexible Systems Ltd v Molkerei Alos Muller GmbH & Co KG (UK Production) [2010] UKSC 14 when answering the central question. In circumstances where the essential terms of an agreement for lease were present (as Sir Michael Barnett had held) there was no scope, as a matter of law, for the application of RTS Flexible Systems. On a proper analysis of the law, upon an objective evaluation of the letter of 7 January 2020, against the undisputed correspondence that led up to that letter, the essential terms of an agreement for lease were present: [EB 147 §88]. In the premises, the learned*

Justices of Appeal (by majority) were wrong, as Winder C.J. had been, to purport to answer the central question by reference to any finding as to the credibility of Mr Smith: [EB 126 §28].

35. The case of *RTS Flexible Systems Ltd v Molkerei Alos Muller GmbH & Co KG (UK Production)* [2010] W.L.R 753 [AB 14/EB 762] is not on point; it had no application to this case.
36. In *RTS* the claimant designed and installed two production lines in the defendant's factory. The parties had agreed that the work in question should proceed before the formal written contract was executed in accordance with the parties' common understanding: see [AB 14/EB 765 §1 – 2; AB 14/EB 781 §46] of *RTS*, per Lord Clarke of Stone-cum-Ebony JSC. The question was whether there was a contract and, if so, what were its terms. The two key problems that arose were (1) what was the effect of the parties' understanding that the contract would "not become effective until each party has executed a counterpart and exchanged it with the other" and (2) were the parties agreed upon all the terms which they objectively regarded or the law required as essential for the formation of legally binding relations?
37. Significantly, neither the learned trial Judge [EB 28 §28] nor the learned Justices of Appeal (by majority) [EB 124 §21] set out the entirety of paragraph [45] of Lord Clarke's speech in *RTS*; they omitted the following:

"Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement." [AB 14/EB 780 §45]
38. *RTS* (and other cases cited therein), was concerned with, as Lord Clarke put it "...the perils of beginning work without agreeing the precise basis upon which it is to be done. The moral of the story is to agree first and to start work later": paragraph [1] of *RTS* [AB 14/EB 765 §1]. In *RTS* the court had to consider whether the "subject to contract" proviso had been waived. As to the correct application of the principles in *RTS*, see [EB 146 §85] per the President, dissenting, and see further below at paragraph 51.

39. In the present case there was an agreement for lease, a concluded agreement, which obliged the parties to enter into a lease, the terms of which had all been agreed: see the dissenting Judgment [EB 140 §73 et seq]. The type of analysis carried out in *RTS* is of no application in the present case: there was no such “subject to contract” situation, nor were the parties in a situation of “beginning work without agreeing the precise basis upon which it is to be done”, nor were there any terms that were required to be finalised. The oral evidence of Mr Smith was nothing to the point and the case could not turn on any finding of credibility of Mr Smith; the trial Judge and the learned Justices of Appeal (by majority) were wrong to consider that it was of any relevance to the question of whether there was an agreement for lease. Sir Michael Barnett, President, disagreed with the learned Justices of Appeal (by majority); in his judgment, whether there was a binding agreement depended not on the credibility of Mr Smith, but on the objective evaluation of the letter of 7 January 2020 against the undisputed background that led up to that letter [EB 147 §88].
40. The Chief Justice rejected the possibility that the communication of May 2018, i.e. the letter at [EB 370], was an offer; and he rejected the possibility that the letter of 7 January 2020 [EB 399] was an offer: [EB 28 §31].
41. But it was not the Appellant’s case that the May 2018 letter was an “offer”. And as for the letter of 7 January 2020, again, it was not the Appellant’s case that this was an “offer”; rather, for the reasons articulated in the dissenting decision of the President in the Court of Appeal, by 7 January 2020 there was already a concluded agreement for lease: [EB 141 §76] – and the reason the Respondent did not sign and seal the lease, which was all that there was left to do, was because the Respondent determined that it had found a better deal i.e. Royal Caribbean Cruise Lines.
42. The learned Chief Justice erred further when he sought to analyse the proposition (which was his own formulation) that the 7 January 2020 might be an “offer” by reference to the Appellant’s letter of 12 February 2020 [EB 30 §33(c); EB 405], and by reference to his views as to the credibility of Mr Smith’s evidence in cross examination: *“Paradise’s own letter of 12 February 2020.... Betrays its own view that the document was subject to execution by the Minister ... I do not accept Smith’s explanation to the contrary”*

43. On a proper analysis, matters had crystallised as at 7 January 2020 and the oral evidence of Mr Smith, or Ms Ferguson were nothing to the point.
44. The Court of Appeal (by majority) repeated the errors of the Chief Justice: **[EB 124 §19 et seq]**. They again made the error of analysing the documents by reference to the oral evidence of Mr Smith: **[EB 126 §29]**.

Ground 3

45. *The learned Justices of Appeal (by majority) misdirected themselves as to the true meaning and effect of the case of Walsh v Lonsdale (1882) 21 Ch D 9: [EB 129 §41] et seq. The legal effect of Walsh v Lonsdale is that if there is an agreement for lease (as the majority ought to have held) then it was irrelevant that the Minister had not signed the lease; the learned Justices of Appeal (by majority) misdirected themselves when formulating the issue in [EB 124 §20].*
46. The analysis of the learned Justices of Appeal (by majority) as to the meaning and effect of the case *Walsh v Lonsdale* was wrong: there is no requirement that the lease which is the subject of an agreement for lease, has to be signed. That was the factual scenario in *Walsh v Lonsdale* itself. Furthermore, the first two sentences of **[EB 129 §41]** demonstrate a further misunderstanding on the part of the learned Justices of Appeal (by majority): the doctrine of part performance is not “*also known as the doctrine in Walsh v Lonsdale...*” The doctrine of part performance is not a requirement for the rule in *Walsh v Lonsdale* to apply. The doctrine of part performance is a separate route by which equity may act so that a contract that fails to comply with the necessary statutory formalities may nevertheless be given effect to. See for example, *Caton v Caton* (1865) L.R. 1 Ch. App 137 **[AB 8/EB 671]**. The two are separate doctrines. The learned Justices of Appeal (by majority) ought to have decided as per the dissenting Judgment of Sir Michael Barnett, at **[EB 140 §73 et seq]**.

Ground 4

47. *The analysis of Winder C.J, as to the legal effect of the Appellant’s letter of 12 February 2020 [EB 443], was wrong in law, and the learned Justices of Appeal (by majority) were wrong to follow the analysis of Winder CJ: [EB 126 §27]. On a proper application of the law, the letter of 12 February 2020 could not affect the position at law, which was there was (already) an agreement for lease, viz. the letter of 7 January 2020 [EB 399] and the lease.*

48. The learned Justices of Appeal (by majority) ought to have held, as per Sir Michael Barnett at **[EB 141 §76; EB 147 §86]** that there was a concluded agreement. The lease sent on 7 January 2020 had been prepared by the Respondent’s lawyers on the Respondent’s instructions. There was no suggestion that there were any terms not yet agreed or which required further discussion. By the time of the letter of 12 February 2020, Mr Smith was seeking “comfort” in his letter, fearing that the Respondent was not signing the lease because, to use Sir Michael Barnett’s words “...the government determined that it had found a better deal”: **[EB 141 §76]**. The 12 February 2020 letter **[EB 443]**, written more than a month after the Appellant had executed the lease sent to him by the Respondent on 7 January 2020 and had sent back to the Respondent the executed lease in accordance with the instructions in the letter, is entirely consistent with there being a concluded agreement and the Appellant becoming concerned that the Respondent was reneging on his obligation to comply with the agreement for lease and refusing to execute the lease. The analysis of the learned trial Judge, set out in the Court of Appeal Judgment at **[EB 125 §26]**, confuses and conflates the principles of an agreement for lease, which then requires the parties to execute the lease that they have previously agreed to. Neither the credibility of Mr Smith, nor the letter of 12 February 2020 have any bearing on the objective analysis of the letter of 7 January 2020 against the undisputed correspondence that led up to that letter: see **[EB 147 §88]** per Sir Michael Barnett.
49. The correct approach was as set out by the President at **[EB 143 §82 – EB 146 §85]**. After distilling the principles following from *Brown t/a Natbros v Smith* [2014] 1 BHSJ No. 67 **[AB 6/EB 651]**, *Winn v Bull* (1877) 7 Ch D 29 **[AB 16/EB 804]** and *Stellard Pty Ltd and another v North Queensland Fuel Pty Ltd* [2015] QSC 119 **[AB 17/EB 808]** and noting that these were the same principles as outlined by the majority **[EB 124 §21]** which had referred to *RTS* (supra), the President put the issue in this way: Whether or not a contract has been formed requires and objective determination of the intention of the parties, which requires determination not only of the text but also of the surrounding circumstances known to the parties and the purpose of the object of the transaction: **[EB 146 §85]**.

50. The learned President applied that test to the facts at **[EB 147 §86]**. There was no suggestion that there were any terms not yet agreed or which required further discussions; negotiations were complete and the terms of the agreement were incorporated in the lease prepared by the Respondent and sent by the Respondent to the Appellant for execution. In any case where it is necessary (but it was not necessary here) the courts will imply the “usual covenants”: see, for example, *Chester v Buckingham Travel Ltd* [1981] 1 W.L.R. 96 at 100H **[AB 9/EB 688]**.

Ground 5

51. *The learned Justices of Appeal (by majority) were wrong to hold that the effect of section 54 (1) of the Conveyancing and Law of Property Act was that there could be no agreement for lease other than by grant under seal: [EB 128 §36]. As a matter of law, section 54 was, as Sir Michael Barnett held, completely irrelevant: [EB 147 §89]. The only legal effect of section 54 is to vest in the Minister a power that had previously vested in the Governor prior to Independence.*

52. Section 54(1) **[AB 1/EB 598]** is nothing more than an enabling mechanism to give effect to the constitutional changes following the Independence of The Bahamas: the section vests in the Minister any power that had previously been vested in Her Majesty or the Governor on her behalf. By section 54(1)(b), if the property, interests or powers referred to therein had previously required a Public Seal, the official seal of the Minister would be required instead. The learned Justices of Appeal (by majority) were wrong in construing this section as meaning that a grant by seal is required for an agreement for lease.

Ground 6

53. *The learned Justices of Appeal (by majority) were wrong to hold that the government could not be bound by the acts of its alleged “agents”: [EB 128 §39]. There is no basis in law for such a conclusion.*

54. The analysis of Sir Michael Barnett is compelling: see **[EB 147 §90 -91]**. There was no basis in law for the learned Justices of Appeal (by majority) to have concluded that the government could not be bound by the acts of its agents.

55. The effect of Section 54(1) of the Conveyancing and Law of Property Act **[AB 1/EB 598 §54]** is *not* that there can be no agreement for lease other than by official seal of the Minister. The true meaning and effect of this section is that it vests a power in the Minister which had previously vested in the Governor.

56. There can be no question as to agency: As set out above, The Bahamas Investment Authority, acts as the administrative arm of the National Economic Council, a committee of Cabinet, Chaired by the Prime Minister; The Bahamas Investment Authority had written to Mr Smith on 23 May 2018 [EB 120 §8; EB 370] setting out the conclusions and recommendations of the NEC, including provisions as to the involvement of the Antiquities, Monuments And Museum Corporation; the Museum and the Appellant executed a deed of Memorandum of Understanding on 2 October 2018: [EB 374]; on 22 January 2019 the Prime Minister directed Ms Candia Ferguson of The Bahamas Investment Authority, to “...*kindly ensure toby receives all the assistance necessary...he must be assisted to ensure success.*” [EB 421] (non-agreed document); on 28 April 2019 the Prime Minister emailed to say that he had “*spoken to BIA, and asked them to resolve matter immediately*”: [EB 423] (non-agreed document); on 15 August 2019 the Chief Counsel of the Attorney General’s Office informed the Appellant that the “...*Crown Lease is being processed*” [EB 425] and on 7 January 2020 the letter was sent to the Appellant with the lease saying: “*Enclosed are the Lease and Counterpart for Lessee signing, dating, sealing...*”: [EB 399]

Ground 7

57. *The learned Justices of Appeal (by majority) were wrong to refuse to order specific performance of the agreement to grant a lease. There being an agreement for lease, the learned Justices of Appeal (by majority) should have ordered specific performance of it, as Sir Michael Barnett would have done: [EB 148 §92] or alternatively order damages for breach of Agreement for a Lease.*
58. Had the learned Justices of Appeal (by majority) not erred in law by wrongly concluding that there was no agreement for lease, they would instead have held that there was a binding obligation to grant a lease, in which case they ought then to have ordered specific performance, as Sir Michael Barnett would have done: [EB 148].

Ground 8

59. *The learned Justices of Appeal (by majority) erred in law and in fact by failing to take any proper account, or given any proper weight, to the fact that the letter of 7 January 2020 had nothing in it to suggest that the agreement was “subject to contract”.*
60. The learned Justices of Appeal (by majority) held, in [EB 127 §34], that “...*the absence of the words “subject to contract” cannot be taken to mean that there was no need for a formal contract to have an agreement between the parties.*” Two reasons

are given in support of that proposition: at [EB 127 §35; EB 128 §36]. As to whether there is a binding agreement, where a document or correspondence is stated to be “subject to contract” “...it means what it says”: see the extract set out from the speech of Jessell MR in *Winn v Bull* at [EB 127 §33]. And, conversely, in the absence of the words “subject to contract” it is a matter of construction. The analysis of the learned Justices of Appeal (by majority), from [EB 127 §34 to EB 128 §36] was wrong and both of the “2 reasons” referred to in [EB 127 §34] were erroneous. The first reason [EB 127 §35], “the conduct of the parties” was not a good reason in law for failing to take any proper account or give any proper weight to the fact that there was nothing to suggest that the letter of 7 January 2020 was “subject to contract”; the purported determination by the learned Justices of Appeal (by majority) as to “conduct of the parties” was itself erroneous, based on a rejection by the trial Judge as to the credibility of the evidence of Mr Smith: [EB 126 §28]. Any finding as to “credibility” of Mr Smith was an irrelevant matter for the reasons explained in relation to Ground 2 and the *RTS* case. The second reason [EB 128 §36] was also in itself wrong because it was based on a misunderstanding of the meaning of section 54 (1) of the Conveyancing and Law of Property Act (see Ground 5 above),

Ground 9

61. *The learned Justices of Appeal (by majority) erred in law and in fact by failing to consider that where a binding agreement is said to have been formed as a result of correspondence, it is necessary to look at that correspondence as a whole, and that it was wrong for the Respondent to isolate or refuse to disclose many parts/ items of correspondence from the rest in order to disprove the existence of a binding agreement.*
62. *The learned Justices of Appeal (by majority) erred in law and in fact in finding on the evidence as a whole, that there was no agreement entered into in that they considered that the Agreement (i.e. the Lease Document) was subject to execution; and/ or there was no part performance, nor any meeting of the minds for there to be an agreement.*
63. Shortly after Chief Justice Sir Ian Winder had delivered his Judgment (14 March 2024) a person, whose identity was not known to Mr Smith, presented Mr Smith with an envelope containing documents which had been in the Respondent’s possession at all material times, but which not been disclosed to the Appellant: [EB 172 §9, 11; 176 §5.]

64. The Appellant included in his Notice of Appeal Motion [EB 161; EB 163 §9] that it would be seeking permission to adduce this newly discovered evidence.
65. The Appellant's Submissions on the introduction of this new evidence are at [EB 165], and the Respondent's Submissions in opposition are at [EB 176]. These were documents which the Respondent had been obliged to disclose to the Appellant which it had failed to disclose.
66. As part of an application to rely upon these newly obtained documents as "new evidence", pursuant to the *Ladd v Marshall* principles [AB 11/EB 707], the Appellant provided an analysis in respect of each of the documents, explaining the prejudice that the non-disclosure of those documents had caused to the Appellant: [EB 234]. The additional documents taken as a whole demonstrated that there was a clear understanding between the parties that there was a binding agreement for lease and that a lease for ready for execution had been prepared. There was a registered plan of the land in question disclosed, surveyed and prepared by the Department of Lands and Surveys as Plan numbered: NP 5957: [EB 384] and referred to as such in the lease sent to the Appellant on [EB 306, 314, 320]. Registration of a plan would only occur when a Crown Lease is settled or fully agreed.
67. The Appellant signed and returned the Lease document as it was instructed to do. There was also evidence of the Appellant entering the property and commencing preparatory works. There was evidence that the Appellant proffered full payment of one year's rent in advance. The Appellant did all that it was required to do. There was nothing further for it to do or negotiate. It had provided evidence of full performance, and it was wrong for the learned Justices of Appeal (by majority) to say that there was no part performance.

E. Disposal

68. The Appellant submits as follows:
- 1) The learned Justices of Appeal (by majority) erred in law in deciding that there was no agreement for lease.

- 2) The error in law was that the learned Justices of Appeal (by majority) asked themselves the wrong question. The real question was not whether the lease signed by the Appellant, but not signed by the Respondent, could be considered as a valid agreement for a lease. The real question was whether the essential terms of an agreement for lease were present.
- 3) Further, it was wrong in law to construe the legal effect of the letter of 7 January 2020 (by which time there was already, on the Appellant's case, an agreement for lease) by reference to the answers given by Mr Smith in cross examination.
- 4) It was a further error in law to confuse the "rule" in *Walsh v Lonsdale* with the doctrine of past performance. This was not a case of past performance. This was a case where there was an agreement for lease, being as good as a lease.
- 5) Had the learned Justices of Appeal (by majority) not so misdirected themselves, they would have held, as the President did, that all the essential terms of an agreement for lease were present; that there was nothing further to be negotiated or agreed, and that there was an agreement for lease.
- 6) Furthermore, (and without prejudice to the primary case of the Appellant that the analysis of the President was the correct approach) in so far as the learned Justices of Appeal (by majority) were "considering the evidence as a whole" (as the Chief Justice had also said, **[EB 135 §64]**), the evidence as a whole ought properly to have included the documents which the Respondent had failed to disclose. The Court of Appeal ought to have admitted the new evidence for the reasons contended for by the Appellant: **[EB 165]**. Having asked, at a hearing on 16 November 2023, for detailed written submission on why, in particular, the second limb of *Ladd v Marshall* was said to be satisfied in the case of each document **[EB 534]**, the Court of Appeal then refused the application at a hearing on 13 December 2023, but gave no detailed reasons for refusing the application to adduce that evidence: **[EB 548 lines 18 to 20]**. That further evidence would have allayed any concerns on the part of the learned Justices of Appeal (by majority) that there was no concluded agreement for lease.

- 7) The Board is respectfully invited to humbly advise His Majesty that the appeal should be allowed.
- 8) The Board is respectfully invited to find to make a declaration that there was an agreement for lease in the terms of the lease attached to the letter to the Appellant dated 7 January 2020.
- 9) The Board is respectfully invited to humbly advise His Majesty that the matter should be remitted to the Court of Appeal to decide on the appropriate injunctive and or compensatory relief.

F. Conclusion

69. For the reasons set out above, to be supplemented by oral submissions at the hearing of this appeal, the appellant respectfully invite the board to allow the appeal.

DAMIEN GOMEZ KC
SIDNEY CAMBRIDGE
(Of the Bar of The Bahamas)
DAMIAN FALKOWSKI
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26 May 2026